primary jurisdiction, interlocutory appeal, failure to disclose, preemption, common law, et seq, preemption issue, consolidated, uniformity, expertise, distance, referral, preempt, airline, occupy, rapid, duties, consumer fraud

# **CORE CONCEPTS** - ♦ Hide Concepts

# Constitutional Law: Supremacy Clause

+The preemption doctrine, which has its origin in the supremacy clause of the Federal Constitution, U.S. Const. art. VI, cl. 2, provides that federal law will in some instances override or preempt state laws on the same subject. The key inquiry in all preemption cases is the objective or purpose of congress in enacting the particular statute. The doctrine requires courts to examine the federal statute in question to determine whether congress intended it to supplant state laws on the same subject. A court must usually divine for itself whether the statute evidences an intent by congress to preempt State law.

# Constitutional Law: Supremacy Clause

\*Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.

# Constitutional Law.: Supremacy Clause

+Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

# © Communications Law: Federal Acts: Communications Act

★ The Federal Communications Act of 1934, 47 U.S.C.S. § 152(a), applies to all interstate and foreign communication by wire or radio and to all persons engaged within the United States in such communication, and provides that an interstate telephone carrier's charges, practices, classifications, and regulations for and in connection with its communication service, shall be just and reasonable. 47 U.S.C.S. § 201(b). Under 47 U.S.C.S. § 206, any carrier which violates a provision of the Communications Act is liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation. 47 U.S.C.S. § An injured party may file a complaint against the carrier with the Federal Communications Commission, 47 U.S.C.S. § 207, which has the power to investigate the matters complained of, 47 U.S.C.S. § 208, and to award damages when appropriate. 47 U.S.C.S. § 209. Alternatively, an aggrieved party can file an action against the carrier in federal district court. 47 U.S.C.S. § 207.

# Communications Law: Federal Acts: Communications Act

+The Federal Communications Act of 1934 contains a saving clause which provides that nothing in the chapter contained shall in any way abridge or alter the remedies existing at common law or by statute, but the provisions of the chapter are in addition to such remedies. 47 U.S.C.S. § 414.

Constitutional Law: Supremacy Clause

- Communications Law: Federal Acts: Communications Act
- In interpreting a statutory provision, courts will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute and the objects and policy of the law. Therefore, it is implausible to think that the Federal Communications Act of 1934 (Act), 47 U.S.C.S. § 414, preserved all state-law remedies affecting interstate telephone carriers no matter how repugnant those state laws are to the purposes and objectives of Congress. It is reasonable to presume that state laws which interfere with Congress' objective of creating a rapid, efficient, nation-wide, communication service with adequate facilities at reasonable charges, 47 U.S.C.S. § 151, such as state attempts to regulate interstate carriers' charges or services, would be preempted by the Act.
- Constitutional Law: Supremacy Clause
- Communications Law: Federal Acts: Communications Act
- A47 U.S.C.S. § 414, when considered in the context of the entire act, should be construed as preserving state-law causes of action for breaches of duties distinguishable from those created under the Federal Communications Act of 1934 (Act). State-law remedies which do not interfere with the federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by § 414.
- Civil Procedure: Jurisdiction
- ★ The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. The doctrine provides that even when a court has jurisdiction over a matter, it should in some instances stay the judicial proceedings pending referral of the controversy, or a portion of it, to an administrative agency having expertise in the area.
- Administrative Law: Separation & Delegation of Power: Jurisdiction
- ★ In cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.
- Administrative Law: Separation & Delegation of Power: Jurisdiction
- ★ A matter should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy, or when there is a need for uniform administrative standards. Conversely, when an agency's technical expertise is not likely to be helpful, or there is no need for uniform administrative standards, courts should not relinquish their authority over a matter to the agency.
- Civil Procedure: Entry of Judgments: Stay of Proceedings & Supersedeas
- ★III. Rev. Stat. ch. 110, para. 2 § 619(a)(3) allows a defendant to move for a dismissal or stay whenever there is another action pending between the same parties for the same cause.
- Divil Procedure: Entry of Judgments: Stay of Proceedings & Supersedeas

Even when the "same cause" and "same parties" requirements are met, Ill. Rev. Stat. ch. 110, para. 2 § 619(a)(3) does not mandate automatic dismissal. Rather, the decision to grant or deny defendant's para. 2 § 619(a)(3) motion is discretionary with the trial court. The circuit court possesses some degree of discretion in ruling upon the motion and that multiple actions in different jurisdictions, but arising out of the same operative facts, may be maintained where the circuit court, in a sound exercise of its discretion, determines that both actions should proceed.

□ Civil Procedure: Entry of Judqments: Stay of Proceedings & Supersedeas
 The factors that a court should consider in deciding whether a stay under III. Rev. Stat. ch. 110, para. 2 § 619(a)(3) is warranted include: comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the res judicata effect of a foreign judgment in the local forum.

**COUNSEL:** Chester T. Kamin, Richard J. Gray, Darryl M. Bradford, Patricia Lee Refo, and Robert S. Markin (Jenner & Block of Chicago, of counsel), for appellant.

Russell C. Green and Alvin W. Block, of Block, Levy & Associates, of Chicago, for appellee S. Kelierman et al.

Kevin M. Forde, Ltd., of Chicago (Kevin M. Forde, of counsel), and Howard Z. Gopman & Associates, of Skokie (Howard Z. Gopman and Katrina Veerhusen, of counsel), for appellee Phyllis Hesse.

**JUDGES:** JUSTICE MORAN delivered the opinion of the court. JUSTICE SIMON took no part in the consideration or decision of this case.

**OPINIONBY: MORAN** 

OPINION: [\*434] [\*\*1047] Plaintiffs, subscribers of defendant MCI's long-distance telephone service, brought these class action suits in the circuit court of Cook County alleging that certain advertisements, which described defendant's service charges, violate the Consumer Fraud and Deceptive Business Practices Act (III. Rev. Stat. 1983, ch. 1211/2, par. 261 et seq.) and [\*\*\*2] the Uniform Deceptive Trade Practices Act (III. Rev. Stat. 1983, ch. 1211/2, par. 311 et seq.). Plaintiffs also allege that defendant's advertising practices constitute a breach of contract and common law fraud. They seek damages and an accounting for themselves and other persons similarly situated.

After the cases were consolidated by the trial court, defendant moved to dismiss the actions, contending that the State-law claims are preempted by the Federal Communications Act of 1934 (Communications Act) (47 <u>U.S.C. sec.</u> 151 *et seq.* (1982)). Alternatively it requested that the court stay the actions and refer plaintiffs' claims to the Federal Communications Commission (FCC) based on the doctrine of primary jurisdiction, or stay the actions pursuant to section 2 -- 619(a)(3) of the Code of Civil Procedure (III. Rev. Stat. 1983, ch. 110, par. 2 -- 619(a)(3)). The trial court denied defendant's motion to dismiss or stay the actions. It also refused defendant's request to certify the preemption issue for interlocutory appeal. (See 87 III. 2d R. 308.) Thereafter, defendant appealed the denial of the stay. (87 III. 2d R. 307.) The appellate court, in addition to affirming [\*\*\*3] the denial of the stay, determined that it had jurisdiction to consider the preemption issue even though the trial [\*435] court had not certified the issue for interlocutory review. The appellate court held that plaintiffs' Statelaw claims are not preempted by the Communications Act. (134 III. ADD. 3d 71.) We allowed defendant's petition for leave to appeal (94 III. 2d R. 315).

Defendant's principal contention is that plaintiffs' claims are preempted by the Communications Act (47 U.S.C. sec. 151et seq. (1982)). Defendant asserts that the "comprehensive nature" of the Communications Act demonstrates that Congress "intended to occupy the entire field of interstate long distance telephone service." It argues that the conduct challenged by plaintiffs is "at the center of the occupied field" and that, therefore, plaintiffs' State-law claims are preempted. Plaintiffs contend, however, that their actions are not preempted, asserting that the only conduct [\*\*1048] being challenged is defendant's advertising practices and not the manner in which it provides interstate telephone service. Defendant raises two alternative arguments as to why this court should either [\*\*\*4] dismiss or stay these actions. First, it contends that under the doctrine of primary jurisdiction the actions should be stayed and plaintiffs' claims referred to the FCC. Additionally, defendant requests that the suits be stayed pursuant to section 2 -- 619(a)(3) of the Code of Civil Procedure (III. Rev. Stat. 1983, ch. 110, par. 2 -- 619(a)(3)), asserting that there is a Federal action pending which involves the same parties and same cause.

The record shows that plaintiffs originally brought four separate actions against defendant in the circuit court. Three of the actions, filed by plaintiffs S. Kellerman, Bernard Turovitz and Louis T. Davis & Associates, Inc. (Davis), were consolidated by the trial court for all purposes. The action brought by Phyllis Hesse was consolidated with the other actions for pretrial purposes only. The allegations contained in all four complaints are substantially similar in that they attack certain of [\*436] defendant's advertisements and promotional material as fraudulent and deceptive.

The advertisements and promotional material in question compare the cost of defendant's long-distance telephone service with the cost of a service provided [\*\*\*5] by a competitor, American Telephone &Telegraph Company (AT&T). Plaintiffs allege that in order to induce them to purchase its service, defendant disseminated certain advertisements and promotional materials through various media which claimed that "although its rates are substantially lower" than AT&T's, "its billing practices and procedures were identical to those of" AT&T. They allege that AT&T charges its customers only for completed calls and no charge is made to customers for calls which are initiated but not completed, *i.e.*, where the recipient does not answer or the caller terminates the call before it is answered. In contrast, plaintiffs allege that defendant has billed its customers for uncompleted calls.

Plaintiffs further allege that it was defendant's practice to impose a surcharge in situations where the telephone rang six or more times before it was answered -- a charge not customarily imposed in the industry. It also is alleged that every time customers used defendant's service they paid a local telephone charge which AT&T customers did not have to pay. Plaintiffs do not challenge the reasonableness of the additional charges imposed by defendant, but only [\*\*\*6] the fact that its advertising did not disclose that the additional charges would be made. It is alleged that through these advertisements and promotions, defendant "engaged in a course of conduct to falsely represent to the plaintiff[s] and the general public that its practice and policy [were] \* \* \* to bill its customers only for the actual time of communication during completed long distance calls" when in fact its practice was to bill its customers for uncompleted calls and to impose a surcharge when a telephone rang six or more [\*437] times before it was answered. Plaintiffs allege that defendant's conduct constitutes common law fraud, a breach of contract, and that it violates the Uniform Deceptive Trade Practices Act (III. Rev. Stat. 1983, ch. 1211/2, par. 311 et seq.) and the Consumer Fraud and Deceptive Business Practices Act (III. Rev. Stat. 1983, ch. 121 1/2, par. 261 et seq.).

Before proceeding with the issues raised by defendant, we find it necessary to determine whether the preemption issue is properly before this court. Plaintiffs Kellerman, Turovitz and Davis contend that since the trial court refused to certify the preemption question for interlocutory [\*\*\*7] appeal in accordance with Supreme Court Rule 308 (87 III. 2d R. 308), the appellate court did not have jurisdiction to consider it. As such, they assert that the

issue is not properly before this court.

The appellate court, relying on this court's decision in <u>May Department Stores Co. v. Teamsters Union Local No, 743 (1976), 64 Ill. 2d</u> 153, held that it had jurisdiction to consider whether [\*\*1049] plaintiffs' actions are preempted by the Communications Act. In <u>May</u>, store owners sought to enjoin a union from soliciting store employees and distributing union literature in the store's parking lot, claiming that the union's activities violated State criminal trespass laws. The union contended that Federal law preempted the authority of the State courts to issue an injunction barring its organizational activities on store property. The trial court granted the preliminary injunction, and the union perfected an interlocutory appeal pursuant to Rule 307. On appeal from the appellate court, this court viewed the union's preemption argument as a challenge to the State courts' authority to issue the preliminary injunction and, therefore, a proper subject on interlocutory [\*\*\*81] appeal.

After reviewing the record in the present case in light of *May*, we believe that the appellate court was **[\*438]** correct in finding that it had jurisdiction to address the preemption issue. Defendant's Federal preemption argument brings into issue the authority of the trial court to enter the order appealed from and, thus, the argument is properly considered on interlocutory appeal. Therefore, we will consider defendant's argument that plaintiffs' Statelaw actions are preempted by the Communications Act.

The preemption doctrine, which has its origin in the supremacy clause of the Federal Constitution (U.S. Const., art. VI, cl. 2), provides that Federal law will in some instances override or preempt State laws on the same subject. ( *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 229-31, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1151-53.) The key inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. The doctrine requires courts to examine the Federal statute in question to determine whether Congress intended it to supplant State laws on the same subject. ( *Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. [\*\*\*9] 202, 208, 85 L. Ed. 2d 206, 213, 105 S. Ct. 1904, 1910.) Generally this is no easy task because rarely does Congress, in enacting legislation, expressly provide that concurrent State laws will be preempted. Rather, a court must usually divine for itself whether the statute evidences an intent by Congress to preempt State law.

Although there is no "rigid formula or rule which can be used" to determine if Congress intended Federal law to preempt plaintiffs' actions for fraud, deceptive advertising and breach of contract (*Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404), our "consideration of that question is guided by familiar and well-established principles" (*Capital* Cities Cable, *Inc. v. Crisp* (1984), 467 U.S. 691, 698, 81 L. Ed. 2d 580, 588, 104 S. Ct. 2694, 2700), which the Supreme Court has enumerated as follows:

[\*439] "Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch [\*\*\*10] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.' [Citation.]

Even where Congress has not completely displaced state regulation in a specific area, State law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation] or when state law 'stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress' \* \* "Fidelity Federal Savings & Loan Association. v. De la Cuesta (1982), 458 U.S. 141, 153, 73 L. Ed. 2d 664, 675, 102 S. Ct. 3014, 3022.

The express purpose of the Communications Act (47 U.S.C. sec. 151 et seq. (1982)) is to "make available, so far as possible, to [\*\*1050] all the people of the United States a rapid, efficient \* \* \* communication service with adequate facilities at reasonable charges." (47 U.S.C. sec. 151 (1982).) To that end, \* [\*\*\*11] the Act applies "to all interstate and foreign communication by wire or radio \* and to all persons engaged within the United States in such communication" (47 U.S.C. sec. 152(a) (1982)), and provides that an interstate telephone carrier's "charges, practices, classifications, and regulations for and in connection with [its] communication service, shall be just and reasonable." (47 U.S.C. sec. 201(b) (1982).) Under section 206, any carrier which violates a provision of the Act is liable "to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation." (47 U.S.C. sec. 206 (1982).) An injured [\*440] party may file a complaint against the carrier with the FCC (47 U.S.C. sec. 207 (1982)), which has the power "to investigate the matters complained of" (47 U.S.C. sec. 208 (1982)), and to award damages when appropriate (47 U.S.C. sec. 209 (1982).) Alternatively, an aggrieved party can file an action against the carrier in Federal district court. 47 U.S.C. sec. 207 (1982).

Defendant essentially makes two arguments as to why plaintiffs' actions are preempted by the Communications Act. First, it argues that the "comprehensive [\*\*\*12] nature" of the Act, as briefly outlined above, demonstrates that Congress "intended to occupy the entire field of long distance telephone service" to the exclusion of State law. It asserts that the conduct challenged here falls within the broad field of interstate long-distance telephone service, and, hence, is preempted. Defendant's second argument is much narrower. While conceding for purposes of argument that the Act may not preempt all State regulation of long-distance telephone carriers, it contends that the Act specifically governs a carrier's "charges, practices and tariffs." Defendant maintains that plaintiffs, although "artfully emphasizing advertising and state law theories of liability," in reality are challenging "FCC-regulated charges, practices and tariffs." It argues that since plaintiffs are attacking "charges, practices and tariffs" regulated by Federal law, the State-law actions are preempted by the Act.

While we agree with defendant that the Communications Act represents a "broad scheme for the regulation of interstate service by communications carriers" ( *Ivy* Broadcasting Co. v. American *Telephone* & Telegraph Co. (2d Cir. 1968), 391 F.2d 486, 490), we cannot [\*\*\*13] agree that Congress intended to supplant all State regulation of interstate telephone carriers, no matter how unrelated the State regulation is from Congress' objective of creating an interstate telephone network that is rapid, efficient [\*441] and reasonably priced. The Act contains a saving clause which provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (47 U.S.C. sec. 414 (1982).) Thus, to argue, as defendant has, that Congress has "occupied the field of interstate long distance telephone service" does not answer the question of whether these particular State-law actions are preempted by the Act. Rather, as the appellate court in this case keenly observed, the relevant inquiry is what are the "precise contours" of the field that Congress has chosen to occupy. 134 Ill. ADD. 3d 71, 74.

Little guidance can be gleaned from the Communications Act itself, and few cases have discussed Federal preemption with respect to the Act. In <a href="Ivy Broadcasting Co. v. American">Ivy Broadcasting Co. v. American</a>
Telephone & Telegraph Co. (2d Cir. 1968), 391 F.2d [\*\*\*14] 486, the court concluded that an action against two telephone companies for the negligent "installation and testing" of telephone lines was governed exclusively by Federal common law. The court, reasoning that the "congressional purpose of uniformity and equality of rates should be taken to imply

uniformity and equality of service," stated that "questions concerning the duties, charges and liabilities of telegraph or telephone companies [\*\*1051] with respect to interstate communications service are to be governed solely by federal law." (391 F.2d 486, 491.1 The Ivy court, however, did not discuss the scope of the saving clause of the Act, section 414 (47 U.S.C. sec. 414 (1982)). Subsequent cases have viewed section 414 as "preserving causes of action for breaches of duties distinguishable from those created under the Act." Comtronics, Inc. v. Puerto Rico Telephone Co. (1st Cir. 1977), 553 F.2d 701, 707-08 n.6.

In Ashley v. Southwestern Bell Telephone Co. (W.D. Tex. 1976), 410 F. Supp. 1389, the court, relying on section [\*442] 414 of the Act, held that a State-law action brought against an FCC-regulated carrier for invasion of privacy was not preempted [\*\*\*15] by the Act. Similarly, in Bruss Co. v. Allnet Communication Services, Inc. (N.D. Ill. 1985). 606 F. Supp. 401, a case closely analogous to the case at bar, the court held that State-law claims alleging common taw fraud and violations of Illinois' deceptive trade and consumer fraud acts were not preempted by the Act. In that case, it was alleged that the defendants had charged plaintiffs and other long-distance customers rates in excess of the tariffs filed with the FCC. The court, reasoning that the State claims "challenge[d] conduct that is not contemplated by the Communications Act," held that the actions were preserved under section 414. 606 F. Supp. 401, 411.

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+In interpreting a statutory provision, courts "will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute and the objects and policy of the law." ( Stafford v. Briggs (1980), 444 U.S. 527, 535, 63 L. Ed. 2d 1, 9, 100 S. Ct. 774, 780.) Therefore, it is implausible to think that section 414 of the Act preserved all State-law remedies affecting interstate telephone carriers no matter how repugnant those State laws are to the purposes [\*\*\*16] and objectives of Congress. It is reasonable to presume that State laws which interfere with Congress' objective of creating "a rapid, efficient, Nation-wide, \* \* \* communication service with adequate facilities at reasonable charges" (47 U.S.C. sec. 151 (1982)), such as State attempts to regulate interstate carriers' charges or services, would be preempted by the Act. (See, e.g., Komatz Construction, Inc. v. Western Union Telegraph Co. (1971). 290 Minn. 129, 186 N.W.2d 691 (action against telegraph company for damages caused by delay in transmission of telegram is governed by Federal law).) However, we believe that \*section 414, when considered [\*443] in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the Act." (Comtronics, Inc. v. Puerto Rico Telephone Co. (1st Cir. 1977), 553 F.2d 701,708.1 State-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Defendant argues that plaintiffs, while [\*\*\*17] "artfully" pleading fraud and deceptiveadvertising claims, in reality "seek recovery for federally regulated charges." As such, it asserts that plaintiffs' actions are preempted by the Act. Although a similar argument has prevailed in at least one Federal district court (see In re Long Distance Telecommunications Litigation (E.D. Mich. 1984), 598 F. Supp. 951), we think the better view is that plaintiffs' actions are not preempted by the Act. (See Bruss Co. v. Allnet Communication Services. Inc. (N.D. III. 1985), 606 F. Supp. 401.) The subject matter of plaintiffs' complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements concerning the cost of its long-distance telephone service. As such, plaintiffs seek to hold defendant to the same standards as they would any other business which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of Federal and State agencies. Moreover, these actions do not [\*\*1052] present "an obstacle to the accomplishment" [\*\*\*18] of the Federal policy of promoting a "rapid, efficient \* \* \* communication service with adequate facilities at reasonable charges." (47 U.S.C. sec. 151 (1982).) The prosecution of these claims will in no way interfere with the

delivery of long-distance telephone service to defendant's customers, and any possible **[\*444]** effect the litigation could have on defendant's telephone rates is speculative at best. Finally, no Federal statute or regulation has been brought to our attention which would expressly prohibit these actions. Therefore, we find that Congress did not intend to occupy the field of interstate telephone service to the extent of barring these State-law claims for fraud, breach of contract and deceptive practices, and hold that plaintiffs' actions are not preempted.

Alternatively, defendant argues that the doctrine of primary jurisdiction requires these actions to be stayed pending review of the claims by the FCC.

\*The doctrine of primary jurisdiction is "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." ( *United* States v. Western Pacific R.R. Co. (1956), 352 U.S. 59,63, 1 L. [\*\*\*19] Ed. 2d 126, 132, 77 S. Ct. 161.165.) The doctrine provides that even when a court has jurisdiction over a matter, it should in some instances stay the judicial proceedings pending referral of the controversy, or a portion of it, to an administrative agency having expertise in the area. ( *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 203-04 48 L. Ed. 2d 643, 654-55, 96 S. Ct. 1978,1986-87.) The Supreme Court, in *Far fast* Conference v. United States (1952), 3-42U.S. 570,96 L. Ed. 576, 72 S. Ct. 492, described the doctrine as follows:



"[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally [\*445] exercised, by preliminary resort for ascertaining [\*\*\*20] and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." (342 U.S. 570,574-75, 96 L. Ed. 576, 582, 72 S. Ct. 492, 494.)

Thus, under the doctrine a matter should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy, or when there is a need for uniform administrative standards. (*United States v. Western Pacific R.R. Co.* (1956), 352U.S. 59, 64,1L. Ed, 2d 126,132, 77 S. Ct. 161, 165.) Conversely, when an agency's technical expertise is not likely to be helpful, or there is no need for uniform administrative standards, courts should not relinquish their authority over a matter to the agency. *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 304, 48 L. Ed. 2d 643, 655, 96 S. Ct. 1978, 1987.

In Nader, the plaintiff was "bumped" from a flight because the defendant airline, as was the industry custom, had overbooked the flight. Civil Aeronautics Board (CAB) regulations required airlines to offer "denied boarding compensation" to bumped passengers. [\*\*\*21] Instead of accepting the offered compensation, however, the plaintiff brought a common law action in Federal district court, alleging that the airline's failure to inform him in advance of its overbooking practices constituted a fraudulent misrepresentation. The district court found for the plaintiff, but the court of appeals reversed, holding that the doctrine of primary jurisdiction required referral of the matter to the CAB so that the agency could determine whether the airline's failure to disclose the overbooking practice was "deceptive" within the meaning of section [\*\*1053] 411 of the Federal Aviation Act of 1958 (49 U.S.C. sec. 1381)

(1970).) The Supreme Court in Nader reversed, concluding that "considerations of uniformity **[\*446]** in regulation and of technical expertise do not call for prior reference to the Board." (426 U.S. 290, 304, 48 L. Ed. 2d 643, 655, 96 S. Ct. 1978, 1987.) The court explained that the plaintiff's common law action for fraudulent misrepresentation did not challenge the propriety or reasonableness of the overbooking practice, and thus, an "informed evaluation of the economics or technology of the regulated industry" was not likely **[\*\*\*22]** to be helpful in resolving the case. (426 U.S. 290, 305-06, 48 L. Ed. 2d 643, 656, 96 S. Ct. 1978, 1987.) Moreover, the court observed that the "standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts." 426 U.S. 290, 305, 48 L. Ed. 643, 656, 96 S. Ct. 1978, 1987.

Our review of the above authorities, particularly the Nader case, convinces us that referral of these actions to the FCC is not required by the primary-jurisdiction doctrine. Like the plaintiff in Nader, the plaintiffs here do not contest the reasonableness or lawfulness of defendant's charges or billing practices, but only seek recovery for defendant's failure to disclose certain facts. In resolving the dispute it will not be necessary to evaluate "the economics or technology of the regulated industry" ( *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 305. 48 L. Ed. 2d 643, 96 S. Ct. 1978, 19872 and, thus, we see little benefit, if any, in referring plaintiffs' claims to the FCC. Plaintiffs allege common law claims and violations of State statutes. The legal and factual issues that are involved in these cases are standard fare for [\*\*\*23] judges, and, consequently, must be deemed to be "within the conventional competence of the courts." ( Nader v. *Allegheny Airlines, Inc.* (19761, 426 U.S. 290, 305-06, 48 L. Ed. 2d 643, 656, 96 S. Ct. 1978, 1987.) Therefore, we reject defendant's argument that the primary-jurisdiction doctrine requires that these actions be stayed pending referral to the FCC.

[\*447] Defendant's final contention is that the trial court should have stayed these actions pursuant to section 2 -- 619(a)(3) of the Code of Civii Procedure (III. Rev. Stat. 1983, ch. 110, par. 2 -- 619(a)(3).) \*\*Section 2 -- 619(a)(3) allows a defendant to move for a dismissal or stay whenever "there is another action pending between the same parties for the same cause." (III. Rev. Stat. 1983, ch. 110, par. 2 -- 619(a)(3).) Defendant claims that a class action suit that is pending in the United States District Court for the Eastern District of Michigan involves the "same cause" and "same parties".

Section 2 -- 619(a)(3) is designed to avoid duplicative litigation and is to be applied to carry out that purpose. (People ex rel. Department of Public Aid v. Santos (1982), 92 III. 2d 120, 127; People ex rel. Phillips [\*\*\*24] Petroleum Co. v. Gitchoff (1976), 65 III. 2d 249, 255.) Nevertheless, Feven when the "same cause" and "same parties" requirements are met, section 2 -- 619(a)(3) does not mandate automatic dismissal. Rather, the decision to grant deny defendant's section 2 -- 619(a)(3) motion is discretionary with the trial court. (People ex rel. Department of Public Aid v. Santos (1982), 92 III. 2d 120, 125.) "The more construction [of section 2 -- 619(a)(3)] is that the circuit court possesses some degree of discretion in ruling upon the motion and that multiple actions in different jurisdictions, but arising out of the same operative facts, may be maintained where the circuit court, in a sound exercise of its discretion, determines that both actions should proceed." A. E. Staley Manufacturing Co. v. Swift & Co. (1980). 84 III. 2d 245, 252-53.

\*The factors that a court should consider in deciding whether a stay under section 2 -- 619 (a)(3) is warranted include: comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the resjudicata effect [\*448] of a foreign judgment in the [\*\*\*25] local forum. (People [\*\*1054] ex rel. Department of Public Aid v. Santos (1982), 92 Ill. 2d 120, 130; A. E. Staley

Manufacturing Co. v. Swift & Co. (1980), 84 Ill. 2d 245. 254.1 Our review of the record in this case shows that the trial judge properly considered the above factors in deciding that a stay was inappropriate, and we find no abuse of discretion.

We note that following the trial court's refusal of defendant's section 2 -- 619(a)(3) motion, the plaintiffs in the Federal case pending in Michigan filed a consolidated complaint. The Federal district court subsequently dismissed the Federal common law claims and referred the remaining claims, based on the Communications Act, to the FCC. (In re Long Distance Telecommunication Litigation (E.D. Mich. 1985), 612 F. Supp. 892.) This subsequent action the Federal court is of no consequence, because all of the reasons that the trial court originally found persuasive in denying the stay are just as applicable, if not more so, now. None of the counts remaining in the Federal action allege common law claims for fraud or breach of contract, or claims based on Illinois' deceptive trade and consumer fraud [\*\*\*26] statutes, but relate only to whether defendant's failure to disclose its charges constitutes a violation of section 201(b) (47 U.S.C. sec. 201(b)) of the Communications Act. The issue of whether defendant's failure to disclose certain charges is "unjust or unreasonable" under section 201(b) of the Communications Act has no relevance as to whether defendant's failure to disclose those charges constituted fraud, a breach of contract, or a violation of Illinois' statutes. While some of the same documentary evidence may be used in both cases, the lawsuits involve entirely different theories and litigation strategies. Thus, considerations of comity, multiplicity and resjudicate do not persuade us that these actions should be stayed. Moreover, as the trial judge observed, these actions were among the first [\*449] to be filed in the country, and, consequently, it cannot be argued that the actions were filed with a vexatious purpose or with the intent to harass defendant. Thus, we find that the refusal to grant a stay pursuant to section 2 -- 619(a)(3) was not an abuse of discretion.

For the reasons stated, the judgment of the appellate court is affirmed.

Judgment affirmed [\*\*\*27] .

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787 F. **Supp.** 852, \*, 1992 U.S. **Dist.** LEXIS 5452, \*\*; 70 Rad. Reg. 2d (P& F) 1387

Muc

AMERICAN INMATE PHONE SYSTEMS, INC., Plaintiff, v. US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, Defendant.

Case No. 91- C 5948

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

787 F. Supp. 852; 1992 U.S. Dist. LEXIS 5452; 70 Rad. Reg. 2d (P & F) 1387

March 31, 1992, Decided April 1, 1992, Filed

#### **CASE SUMMARY**

**PROCEDURAL POSTURE:** Plaintiff phone systems corporation filed a two-count complaint in state court seeking relief based on Illinois law. Defendant, a communications limited partnership, removed the action to the court, claiming that federal law preempted the phone systems corporation's state-law claims. The phone systems corporation filed a motion to remand the action to state court pursuant to **28** U.S.C.S. § 1447(c) and sought attorney fees for wrongful removal.

**OVERVIEW:** The phone systems corporation's state court complaint against the communications limited partnership alleged breach of a verbal agreement and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121-1/2, para. 261 et seq. The communications limited partnership removed the action to federal court, claiming federal question jurisdiction under the Communications Act, 47 U.S.C.S. § 151 et seq. The court granted the phone systems corporation's motion to remand, holding that the court lacked federal question subject matter jurisdiction because the phone systems corporation's claims for breach of a verbal contract and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act did not state a federal claim and were not preempted by the federal law. The court denied the phone systems corporation's 28 U.S.C.S. § 1447(c) motion for attorney fees and expenses incurred in responding to the communications limited partnership's removal, holding that there was no indication that the communications limited partnership acted in bad faith.

**OUTCOME**: The court granted the phone systems corporation's motion for a remand but denied its request for attorney fees.

**CORE TERMS:** Communications Act, removal, preemption, state-law, federal question, preempted, federal law, duty, verbal contract, Deceptive Business Practices Act, breach of contract, causes of action, subject matter jurisdiction, state law, telephone, breached, diversity jurisdiction, federal claim, savings clause, original jurisdiction, distinguishable, citizenship, interstate, interfere, preempt, common carrier, partnership, fraudulent, preserved, surcharges

**CORE CONCEPTS** - ◆ Hide Concepts

- Civil Procedure: Removal: Postremoval Procedures
- +On a motion to remand, the question before the court is its authority to hear a case pursuant to the removal statute. Whether removal was proper is determined from the record as a whole. The party seeking removal, and not the party moving to remand, has the burden of establishing that the court has jurisdiction. If the district court finds that it has no jurisdiction, the district court must remand the case to state court.
- Civil Procedure-: Removal : Basis for Removal
- The removal statute, 28 U.S.C.S. § 1441(b), provides that any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties.
- Civil Procedure: Removal: Basis for Removal
- **★** Federal district courts are courts of limited subject matter jurisdiction. In general, a civil action brought in state court may be removed to federal court only if it could have been originally brought in federal court. 28 U.S.C.S. § 1441. The federal courts have jurisdiction either when the parties to the lawsuit are of diverse citizenship or when the case involves a federal question. 28 U.S.C.S. §§ 1331, 1332.
- Civil Procedure: Jurisdiction: Diversity Jurisdiction: Citizenship
- \*For purposes of diversity citizenship, the citizenship of all a limited partnership's partners must be considered.
- Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction +The federal question statute, 28 U.S.C.S. § 1331, provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
- Divil Procedure: Removal: Removal Procedures
- ★ When deciding whether a case warrants removal because a federal question is involved, a federal court must principally determine if the federal question appears on the face of plaintiffs complaint. A defendant cannot create a federal question by asserting an issue of federal law in a pleading or in a petition for removal. On the other hand, removal is proper if the plaintiff has attempted to avoid a federal forum by drafting an essentially federal claim in terms of state law. To provide grounds for removal, the federal question must be a key element of the plaintiff's complaint.
- Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction
- A federal question does not appear on the face of the plaintiff's complaint when a defense of federal preemption is raised. Therefore, a preemption defense does not authorize removal of a case to federal court. Under an exception to this general rule, removal is proper when Congress has completely preempted an area of state law. When the complete preemption exception applies, the plaintiff's state-law claim is recharacterized as a federal claim. Whether a cause of action has been completely preempted depends on the intent of Congress.
- Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction
- ▲ A defendant cannot create a federal question by asserting an issue of federal law in a pleading or in a petition for removal.
- Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction
- ★To determine whether the complete preemption exception applies requires an inquiry into Congress' intent in enacting a statute.

- Communications Law: Federal Acts: Communications Act
- ♣ The savings clause, 47 U.S.C.S. § 414, provides that nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. Section 414 preserves state court claims for breaches of duties that are distinguishable from duties created by the Communications Act, such as breach of contract claims.
- Communications Law: Federal Acts: Communications Act
- A claim under the Illinois Consumer Fraud and Deceptive Business Practices Act is preserved by § 414 of the Communications Act.
- Communications Law: Federal Acts: Communications Act
- %Section 201(b) of the Communications Act, 47 U.S.C.S. § 201(b), states that all charges, practices, classifications and regulations for an in connection with such communication service shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.
- Communications Law: Federal Acts: Communications Act
- Section 207 of the Communications Act, 47 U.S.C.S. § 207, states that any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, any district court of the United States of competent jurisdiction; however, such person shall not have the right to pursue both such remedies.
- Communications Law: Federal Acts: Communications Act
- ★Section 414 of the Communications Act (Act) indicates Congress' desire to preempt only those claims which interfere with the congressional objective, embodied in the Act, of providing a national communication system with adequate facilities at reasonable charges. However, under Illinois law, § 414 does not preempt state-law claims for breach of contract and fraud that are not contrary to the Communication Act's objectives. Section 414 should be construed as preserving state law causes of action for breaches of duties distinguishable from those created under the Act. State law remedies which do not interfere with the federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by § 414. Claims involving the quality of a communications company's service or the reasonableness and lawfulness of its rates are preempted, while actions relating to breaches distinguishable from the Act, such as false advertising and breach of contract, can be pursued under state or federal law.
- Divil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction
  Communications Law: Federal Acts: Communications Act
- The need for a nationwide system of rapid, efficient communication does not alone justify a federal court's determination of exclusive jurisdiction.
- Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction

  Civil Procedure: Removal: Basis for Removal
- Communications Law: Federal Acts: Communications Act
- Although jurisdiction for a suit under § 202 of the Communications Act (Act) is arguably contemplated by § 207 of the Act, there is no language in the statute or its legislative history to support the proposition that Congress has clearly manifested an intent to make such causes of action removable to federal court.

- Communications Law: Federal Acts: Communications Act
- Section 202(a) of the Communications Act, 47 U.S.C.S. § 202(a), prohibits a common carrier from practicing unjust or unreasonable discrimination in practices or services.
- Civil Procedure: Removal: Postremoval Procedures
- Civil Procedure: Costs & Attorney Fees: Attorney Fees
- **28** U.S.C.S. § 1447(c) provides that an order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

JUDGES: [\*\*1] ALESIA

**OPINIONBY: JAMES H. ALESIA** 

OPINION: [\*853] MEMORANDUM OPINION AND ORDER

Now before the court is plaintiffs motion to remand this action to state court, pursuant to  $\underline{28}$   $\underline{\text{U.S.C.}}$  §  $\underline{1447}$ (c). Plaintiff filed its two-count complaint in state court seeking relief based on Illinois law. Defendant removed the action to this court claiming that federal law preempts plaintiffs state-law claims. For the reasons set forth below, we hold that defendant's removal was improper because this court lacks subject matter jurisdiction. Plaintiffs motion to remand is granted.

## **■\_FACTS**

Plaintiff American Inmate Phone Systems, Inc. ("AIPS") filed a two count complaint in the Circuit Court of Cook County against defendant US Sprint Communications Company Limited Partnership ("Sprint"). AIPS provides pay phone services to prisons and Sprint provides long distance phone service throughout the U.S.

In Count Iof its complaint, AIPS alleges that Sprint entered into a verbal agreement to provide long distance service to AIPS and breached that agreement. The terms of the alleged agreement included: Sprint would waive all phone card surcharges to AIPS; Sprint would provide AIPS with forward discounting; Sprint [\*\*2] would introduce procedures to reduce the number of fraudulent [\*854] phone calls; and Sprint would provide a written agreement including these terms. (Complaint, at 1-3) In Count II, AIPS alleges Sprint violated the Illinois Consumer Fraud and Deceptive Business Practices Act, III. Rev. Stat. ch. 121-1/2, paras. 261 et. seq. (Complaint, at 3-5)

Sprint answered the complaint and filed a counter-claim alleging that AIPS entered into a written contract for tariffed phone service and subsequently breached that contract by failing to pay for the service provided. Sprint filed a petition to remove the action to the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1446(b). Sprint asserted that the federal court had original jurisdiction over the case under the Communications Act, 47 U.S.C. §§ 151et. seq., pursuant to 28 U.S.C. § 1331,

AIPS has now moved to remand this action to the Circuit Court of Cook County and attorney's fees and costs as a result of wrongful removal pursuant to 28 U.S.C. 1447(c).

## 11. DISCUSSION

## A. Standard of Review

+On a motion to remand, the question before the court is its authority to hear [**3] a case
pursuant to the removal statute. n1 Commonwealth Edison Co. v. Westinghouse Elec. Co.,
759 F. SUDD. 449, 451 (N.D. III. 1991). Whether removal was proper is determined from the
record as a whole. Kennedy v. Commercial Carriers, Inc., 739 F. SUDD. 406, 409 (N.D. Ill.,
1990). The party seeking removal, and not the party moving to remand, has the burden of
establishing that the court has jurisdiction. Commonwealth Edison, 759 F. SUDD. at 452. If
the district court finds that it has no jurisdiction, the district court must remand the case to
state court. Commonwealth Edison, 759 F. Supp. at 452.

n I The removal statute Drovides:

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

28 U.S.C. § 1441(b).

# B. Subject [\*\*4] Matter Jurisdiction

Federal district courts are courts of limited subject matter jurisdiction. In general, a civil action brought in state court may be removed to federal court only if it could have been originally brought in federal court. 28 U.S.C. § 1441. The federal courts have jurisdiction either when the parties to the lawsuit are of diverse citizenship or when the case involves a federal question. 28 U.S.C. §§ 1331, 1332. Sprint has not based its removal on diversity jurisdiction. n2 Therefore, the jurisdiction necessary for removal of this case must be based on a question of federal law. The appropriate inquiry is whether the AIPS' state-law claim arises under federal law. n3 Boyle v. MTV Networks, Inc., 766 F. Supp. 809, 812-13 (N.D. Cai. 1991).

n2 Neither AIPS or Sprint has discussed the question of diversity jurisdiction. 28 U.S.C. § 1332. If AIPS and Sprint are of diverse citizenship and the amount in controversy exceeds \$ 50,000, this court might well have jurisdiction over this suit independent of federal question jurisdiction. AIPS is an Illinois corporation. Complaint, at 1. Sprint is said to be Delaware-based limited partnership. This, however does not settle the question of diversity of citizenship. For purposes of diversity citizenship, the citizenship of all a limited partnership's partners must be considered. Carden v. Arkoma Assoc., 494 U.S. 185, 110 S. Ct. 1015, 1017-22, 108 L. Ed. 2d 157 (1990); Market Street Assoc. Ltd. Partnership v. Frey, 941 F.2d 588, 589 (7th Cir. 1991). In any event, Sprint has not pleaded diversity jurisdiction in its petition for removal and, therefore, we do not consider whether we have diversity jurisdiction. [\*\*5]

n3 \*The federal question statute provides:

The district courts shall have original jurisdiction of all civil actions arising under

the Constitution, laws, or treaties of the United States.

28 <u>U.S.C. § 133</u> 1 (1991).		
End Footnotes	 	 *

When deciding whether a case warrants removal because a federal question is involved, a federal court must principally determine if the federal question appears on the face of plaintiffs complaint. *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 575 (7th Cir.), cert. denied, 459 U.S. 1049, 74 L. Ed. 2d 618, 103 S. Ct. 469 (1982). A defendant cannot create a federal [\*855] question by asserting an issue of federal law in a pleading or in a petition for removal. *Kerr-McGee*, 677 F.2d at 575. On the other hand, removal is proper if the plaintiff has attempted to avoid a federal forum by drafting an essentially federal claim in terms of state law. *Kerr-McGee*, 677 F.2d at 575. To provide grounds for removal the federal question must be a key element of the plaintiff's complaint. *Kerr-McGee*, 677 F.2d at 575,

4A [\*\*6] federal question does not appear on the face of the plaintiff's complaint when a defense of federal preemption is raised. Lister v. Stark, 890 F.2d 941, 943 (7th Cir. 1989), cert. denied, 112 L. Ed. 2d 584, 1115. Ct. 579 (1990). Therefore, a preemption defense does not authorize removal of a case to federal court. Lister, 890 F.2d at 943. The Supreme Court, however, has created an exception to this rule. Lister, 890 F.2d at 943 (citing Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 66, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987)). Under this exception, removal is proper when Congress has completely preempted an area of state law. When the complete preemption exception applies, the plaintiff's state-law claim is recharacterized as a federal claim. Lister, 890 F.2d at 943. Whether a cause of action has been completely preempted depends on the intent of Congress. Lister, 890 F.2d at 943.

Two inquiries are necessary to resolve the jurisdictional question of this case. Lister, 890 F.2d at 944, The first inquiry is whether a federal question appears on the face of plaintiff's [\*\*7] complaint. If so, then the removal was proper. If no federal question appears on the complaint, the second inquiry is whether removal is proper under the complete preemption exception. Lister, 890 F.2d at 944.

In this case, AIPS' complaint does not allege a federal claim and federal law has not completely preempted state law in this area. As a result, this court does not have subject matter jurisdiction and must remand the matter to state court.

## 1. AIPS' Complaint

In the present case, Count Iof AIPS' complaint alleges breach of a verbal contract entered into on or about March 12, 1990. Count II alleges violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Sprint argues, however, that AIPS' complaint alleges a breach of a written contract for long distance service entered into by the parties on May 15, 1990. Sprint contends that a tariff is incorporated into this contract and, as a result, AIPS is alleging a breach of a tariff.

In fact, AIPS' complaint alleges breach of a verbal contract. Neither count alleges a violation of the Communications Act or any other federal law or of Sprint's tariff. A defendant cannot create [\*\*8] a federal question by asserting an issue of federal law in a pleading or in a petition for removal. Kerr-McGee, 677 F.2d at 575. Therefore, no federal cause of action appears on the face of AIPS' complaint, As a result, the second inquiry is whether removal is proper under the complete preemption exception.

# 2. Preemption

Congress' intent in enacting a statute. *Lister*, 890 F.2d at 943. A few courts have addressed preemption in the context of the Communications Act. In Ivy *Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2d Cir. 19682 the Second Circuit Court of Appeals found that the Communications Act completely preempted state common law actions against a telephone carrier for negligence or breach of contract. Ivy involved claims against AT & T for negligence and breach of contract. The court held that issues of duties, charges, and liabilities of telephone companies with respect to interstate communications service were to be governed solely by federal law. Ivy, 391 F.2d at 491. [\*\*9] The court found that the states were precluded from acting in this area. The Ivy court considered various provisions of the Communications Act and found a congressional purpose of uniformity and equality of rates and service. *Ivy*, 391 F.2d at 491. [\*856] According to the Ivy court, this purpose could be achieved only by the application of uniform federal law.

The court declines to follow Ivy for a number of reasons. First, the Ivy court did not address the "savings clause" of the Communications Act. The savings clause provides:

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414. Since Ivy, other courts have addressed the remedies Congress had in mind when enacting § 414. See *Comtronics, Inc. v. Puerto* Rico *Tel. Co.*, 553 F.2d 701 (1st Cir. 1977). The Comtronics, court interpreted § 414 as preserving state court claims for breaches of duties which are distinguishable from duties created by the Communications Act, such as breach of contract claims. Comtronics, 553 F.2d at 708, n.6. [\*\*10] Other courts have approved state-law claims for fraud and deceit as well. See *In Re Long Distance Telecommunications Litigation*, 831 F.2d 627, 633 (6th Cir. 1987). n4

n4 The *In* re Long Distance Telecommunications *Litigation* court compared § 414 to an identical savings clause contained in the Aviation Act, 49 U.S.C. § 1506. The court noted that the Supreme Court, in Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976), which involved a common law action for misrepresentation, held the Aviation Act savings clause as not "absolutely inconsistent" with the common law action. *In re Long Distance Litigation*, 831 F.2d at 634 (quoting *Nader*, 426 U.S. at 300).

A single court in this district has considered this question. In *Bruss Co. v. Allnet*Communication Services, Inc., 606 F. Supp. 401, 411 (N.D. III. 1985), Judge Nordberg determined that a complaint which alleged violations of the Illinois Consumer Fraud [\*\*11] and Deceptive Business Practices Act and the Illinois Deceptive Trade Practices Act, was saved from preemption by § 414. In *Bruss*, the plaintiffs, former subscribers to the defendants' long-distance service, brought state-law claims for common law fraud and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Deceptive Trade Practices Act. Defendants moved to dismiss, arguing that the Communications Act preempted the state-law claims. *Bruss*, 606 F. Supp. at 409. The court applied § 414 to preserve the state-law actions, reasoning that the duties owed by

defendants under these causes of action were distinct from the duties created by the Communications Act. *Bruss.* 606 F. Sudd. at 411. Moreover, the court reasoned that the state-law causes of action prohibited different conduct from that prohibited by the Communications Act. *Bruss.* 606 F. Sudd. In addition, the causes of action did not conflict with the provisions of the Communications Act or interfere with Congress' regulatory scheme. *Bruss.* 606 F. Sudd. at 411.

AIPS, like the plaintiff in [\*\*12] Bruss, is alleging Sprint violated the Illinois Consumer Fraud and Deceptive Business Practices Act. In addition, AIPS alleges that the Sprint breached a verbal contract. We agree with the Bruss court that \$\frac{1}{4}\$ a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act is preserved by \$\frac{1}{4}\$ 414 of the Communications Act. In addition, we are persuaded by the Bruss court's reasoning to conclude that the duties created by the verbal contract are distinct from the duties created the Communications Act. We also find that the contract claim neither conflicts with the provisions of the Communications Act nor interfere with the regulatory scheme of the Act. The alleged verbal contract between AIPS and Sprint set up a business relationship whereby Sprint would sell long distance service under certain terms and that AIPS would buy the long distance service under the terms stated.

Sprint argues that the terms of the alleged contract, that Sprint would waive certain telephone surcharges, would provide forward pricing discounts and would protect AIPS from fraudulent telephone calls raise an issue of whether Sprint's charges are "fair and reasonable". Memorandum [\*\*13] of Law in Support of Defendant's Petition for Removal, at 3. If this were true, then AIPS' suit would be specifically preempted [\*857] by the Communications Act. 47 U.S.C. §§ 201(b), 207. n5 However, the duty set forth in § 201(b) requiring "just and reasonable" practices is different than the duty allegedly breached by Sprint. AIPS is not alleging that Sprint's verbal promises were not just and reasonable. AIPS is alleging that Sprint made the promises to provide forward discounting, to waive certain surcharges and to protect AIPS from fraudulent charges and then did not fulfill these promises. AIPS is not alleging Sprint breached its statutory duty to act in a just and reasonable manner. Rather, AIPS is alleging Sprint failed to abide by a verbal contract the parties allegedly entered into, a contract imposing duties different than those found in the Communications Act.

n5 \*Section 201(b) states:

All charges, practices, classifications and regulations for an in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . . •

Section 207 states:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission . . ., or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, any district court of the United States of competent jurisdiction; but such person shall not have the right to

pursue both such remedies.

While not controlling on us here, we note that the Illinois Supreme Court, in a case involving facts similar to *Bruss*, reached the same conclusion as that of the *Bruss* court. See *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24 (Ill.), cert. denied, 479 U.S. 949, 93 L. Ed. 2d 384, 107 S. Ct. 434 (1986). In Kellerman, plaintiffs, who were subscribers to the defendant's long-distance service, brought action under the Illinois Consumer Fraud and Deceptive Practices Act and the Illinois Uniform Deceptive Trade Practices Act. The Kellerman plaintiffs charged that the defendant's advertising practices constituted breach of contract and common law fraud. *Kellerman*, 493 N.E.2d at 1045. The court found that \(\frac{1}{2}\)§ 414 indicated Congress' desire to preempt only those claims which interfered with the congressional objective, embodied in the Communication Act, of providing a national communication system with adequate facilities at reasonable charges. However, the Illinois Supreme Court concluded \(\frac{1}{2}\) 414 would not preempt state-law claims for breach of contract and fraud which were not contrary to the Act's objectives.

It is reasonable [\*\*15] to presume that State laws which interfere with Congress' objective of creating "a rapid, efficient, Nation-wide, \* \* \* communication service with adequate facilities at reasonable charges" (47 U.S.C. sec. 151 (1982)), such as State attempts to regulate interstate carriers' charges or services, would be preempted by the Act. (See, e.g. Komatz Construction, Inc. v. Western Union Telegraph Co. (1971), 290 Minn. 129, 186 N.W.2d 691 (action against telegraph company for damagers caused by delay in transmission of telegram is governed by Federal law).) However, we believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the Act. . . . " State law remedies which do not interferer with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Kellerman, 493 N.E.2d at 1051 (ellipses original; some citations omitted). According to the court, claims involving the quality [\*\*16] of the defendant's service or the reasonableness and lawfulness of its rates would be preempted, while actions relating to breaches distinguishable from the Act, in Kellerman, false advertising and breach of contract, could be pursued under state or federal law. Kellerman, 493 N.E. 2d at 1051-52.

AIPS' complaint does not allege that Sprint's charges are unreasonable or unfair. [\*858] AIPS does not attack the quality of Sprint's services. AIPS seeks to demonstrate the existence of a verbal contract and to hold Sprint to the terms of the contract. Alternatively, AIPS seeks to recover for Sprint's alleged misrepresentation. Despite Sprint's status as a common carrier controlled in large measure by statute, Sprint is still held to the same duties as normal business entities when entering into contracts or when making business representations. The need for a nationwide system of rapid, efficient communication does not alone justify a federal court's determination of exclusive jurisdiction. Nordlicht v. New York Tel. Co., 799 F.2d 859, 864-65 (2d Cir. 1986), cert. denied, 479 U.S. 1055, 93 L. Ed. 2d 981, 107 S. Ct. 929 (1987); Kellerman, 493 N.E.2d at 1052. [\*\*17] Accordingly, AIPS' state-law contract claim is preserved by § 414.

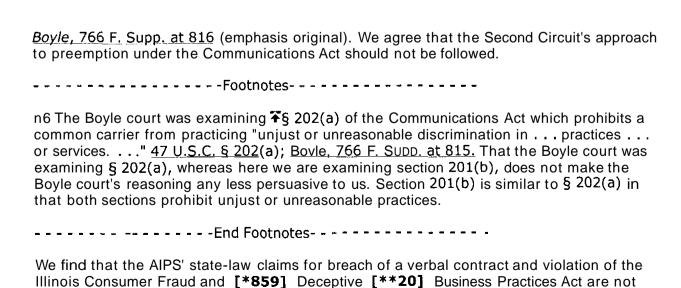
The second reason the court declines to follow Ivy is because the analysis in Ivy predates relevant Supreme Court preemption analysis. The court in Boyle v. MTV Networks, Inc. analyzed the complete preemption exception in connection with the Communications Act. Boyle, 766 F. Supp. at 809. In Boyle, the district court held that plaintiffs claim under California's deceptive business practice act was not preempted by the Communications Act. n6 The court determined that the Supreme Court has found complete preemption only in limited circumstances. Boyle, 766 F. Supp. at 815 (primarily in cases raising claims preempted by § 301 of the Labor Management Relations Act). More importantly, in analyzing the complete preemption doctrine, the court noted that the Second Circuit's approach to preemption under the Communications Act, see Nordlicht, 799 F.2d at 864-65, following Ivy Broadcasting Co. v. AT&T, 391 F.2d 486 (2d Cir. 1968), predated the Supreme Court's complete preemption analysis in Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987) [\*\*18] and Caterpillar, Inc. v. Williams, 482 U.S. 386, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). Boyle, 766 F. Supp. at 816. The Boyle court stated:

\*Although jurisdiction for a suit under [Communications Act] section 202 is arguably contemplated by section 207, Defendants have not pointed to and the Court is not aware of any language in the statute or its legislative history to support the proposition that Congress has clearly manifested an intent to make such causes of action removable to federal court.

\* \* \*

preempted by federal law.

Defendants cite two Second Circuit cases for the proposition that Plaintiff's state law cause of action is pre-empted by the [Communications Act]. These cases, however, were decided before Metropolitan Life and Caterpillar. Additionally, Nordlicht v. New York Tel. Co., 799 F.2d 859, 862-63 (2d Cir. 19862 held that federal common law, rather than section 207 of the [Communications Act], pre-empted the state law causes of action for fraud and for money had and received. In Nordlicht, the Second Circuit did not discuss the Supreme Court's "complete pre-emption" analysis, but instead followed its prior decision in Ivy Broadcasting Co. v. AT & T, 391 F.2d at 486, 489-91 (2d Cir. 1968). [\*\*191 To the extent that the Second Circuit cases are inconsistent with the Supreme Court's analysis of "complete pre-emption," this Court respectfully declines to follow them.



# C. Costs and Attorney's Fees

AIPS has requested payment of costs and attorney's fees as a result of improper removal of this case. Title 28, section 1447(c) of the United States Code provides that an "order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The present case involves complex issues and Sprint has presented a substantial jurisdictional question. Boyle, 766 F. Supp. at 817; Turner v. Bell Federal Savings and Loan Association, 490 F. Supp. 104, 105 (N.D. III. 1980). There is no indication that Sprint acted in bad faith. Whitestone Savings and Loan Ass'n v. Romano, 484 F. Supp. 1324, 1327 (E.D. N.Y. 1980).

AIPS is not entitled to costs and expenses incurred in responding to Sprint's petition for removal.

# III. CONCLUSION

The court lacks federal question subject matter jurisdiction because AIPS' complaint does not state **a** federal claim and AIPS' state-law claim **is** not preempted by the Communications Act. AIPS' motion to remand this matter to **[\*\*21]** the state court is GRANTED. AIPS is not entitled to attorney's costs and expenses incurred in responding to Sprint's motion. AIPS' requests for costs and attorney's fees is DENIED. This matter is REMANDED to the Circuit Court of Cook County, Illinois, County Department, Chancery Division.

Date: March 31, 1992

JAMES H. ALESIA

United States District Judge

Service: **Get by LEXSEE®** Citation: **787f Supp 856** 

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Date/Time: Tuesday, June 4,2002 - 3:00 PM EDT

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Case #8

867 F. **Supp.** 1511, \*; 1994 U.S. **Dist.** LEXIS 17026, \*\*; 77 Rad. Reg. 2d (P & F) **404** 

COOPERATIVE COMMUNICATIONS, INC., a Utah corporation, Plaintiff, vs. AT&T CORP., a New York corporation, Defendant.

Civil No. 9-C-431G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

867 F. Supp. 1511; 1994 U.S. Dist. LEXIS 17026; 77 Rad. Reg. 2d (P & F) 404

November 15, 1994, Decided November 15, 1994, FILED

**CORE TERMS:** Communications Act, state law, preempted, telecommunications, customer, federal common law, causes of action, savings clause, filed tariff, tariff, interstate, telephone, Federal Communications Act, carrier, misrepresentation, common law, aggregator, breach of contract, federal law, disparagement, interfere, regulated, provider, duties, preemption, intentional interference, unfair competition, motion to dismiss, regulatory scheme, distinguishable

**COUNSEL:** [\*\*1] For COOPERATIVE COMMUNICATIONS, INC., Plaintiff: Thomas R. Karrenberg, John P. Mullen of Anderson & Karrenberg.

For AT&T, Defendant: Richard M. Hymas of Nielsen &Senior.

JUDGES: J. THOMAS GREENE, UNITED STATES DISTRICT JUDGE

**OPINIONBY: J. THOMAS GREENE** 

OPINION: [\*1513] MEMORANDUM DECISION AND ORDER

This matter came before the Court on Defendant AT&T Corporation's ("AT&T") Motions to Dismiss and to Strike. Plaintiff Cooperative Communications, Inc. ("CCI"), was represented by Thomas R. Karrenberg and Iohn P. Mullen of Anderson & Karrenberg. AT&T was represented by Richard M. Hymas of Nielsen & Senior. The parties filed extensive memoranda and supporting materials, after which the Court heard oral argument and took the matter under advisement. Having considered the oral argument, motions, and memoranda on file, and now being fully advised, the Court renders its Memorandum Decision and Order.

# **FACTUAL BACKGROUND**

In 1988, AT&T obtained approval from the Federal Communications Commission ("FCC") for series of volume-based tariffs which allowed AT&T to sell long distance [\*1514] communications services that could be purchased in large quantities at a discounted rate. Thereafter, companies known as "aggregator" companies began [\*\*2] to contract with AT&T to purchase large amounts of AT&T long distance services at the discounted rates. The aggregators would then contract with persons or entities using smaller amounts of long distance service. The aggregator companies would aggregate the smaller customers, increasing their joint purchasing capacity, enabling the customers to purchase, through the aggregators, AT&T long distance services at a lower price than the persons or entities could

have obtained from AT&T directly.

In 1989, Edwin B. HerrNeckar and Anne Smith HerrNeckar incorporated CCI under Utah law as an aggregator telecommunications company. CCI alleges that shortly after CCI commenced operation, the local office of AT&T attempted to drive CCI out of business. CCI claims that AT&T, through the Salt Lake City branch office, engaged in wrongful acts as part of a systematic campaign aimed at discrediting CCI and interfering with CCI's customers. CCI alleges, inter alia, that AT&T made intentional misrepresentations to CCI's clients regarding CCI's ability to provide the services it promised, that AT&T misappropriated confidential client billing information, and that AT&T used that information in attempting [\*\*3] to destroy CCI's customer base.

Specifically, CCI's complaint lists seven causes of action. They are: (1) intentional interference with prospective economic relations; (2) interference with contract; (3) business disparagement; (4) breach of the covenant of good faith and fair dealing; (5) unfair competition; (6) violation of the Utah Uniform Trade Secrets Act, Utah Code Ann. §§ 13-24-1 to -9 (1992); and (7) violation of the Federal Communications Act, 47 U.S.C. §§ 151-613 (1991 & Supp. 1994) ("Communications Act" or "Act").

AT&T responded by moving to dismiss CCI's state law claims on preemption grounds, and to dismiss CCI's federal claim, as well as any state law claims not preempted, as barred by the filed tariff doctrine. AT&T also moved to strike from the complaint all allegations regarding alleged wrongful acts occurring more than two years before the suit was filed as being time barred, in light of the two-year statute of limitations in the Communications Act.

#### Standard of Review

In determining whether to grant a motion to dismiss, this Court looks solely to the material allegations of the complaint, and must accept all material allegations [\*\*4] of the complaint as true. Ash Creek Mining Co. v. Luian, 969 F.2d 868, 870 (10th Cir. 1992). Additionally, all inferences that can be drawn from the allegations must be drawn in favor of the plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). A motion to dismiss will not be granted "unless it appears beyond doubt that the plaintiff can Drove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

# ■ APPLICATION OF THE FEDERAL COMMUNICATIONS ACT IN PREEMPTION OF STATE LAW CLAIMS

AT&T first moves this Court to dismiss CCI's six state statutory and common law claims as being preempted by the Federal Communications Act, 47 U.S.C. 151 §§ 151-613 (1991 & Supp. 1994).

# A. The Preemption Doctrine

The preemption doctrine originates from the Supremacy Clause in the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law [\*\*5] of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art VI, cl. 2. Under the Supremacy Clause, state laws which "'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution,' are invalid." Wisconsin Pub, Intervenor v. Mortier, 501 U.S. 597, 604, 115 L. Ed. 2d 532, 1115. Ct. 2476 (1991) (quoting Gibbons v. Ogden, 22 U.S. 1, 211, 6 L. Ed. 23 (1824)).

[\*1515] The primary inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202,

208, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985); Cipollone v. Liggett Group, Inc., 120 L. Ed. 2d 407, 112 S. Ct. 2608, 2617 (1992). Congressional intent may be expressly stated in the language of the statute, or may be implied by the structure and purpose of the statute. See Cippolone, 112 S. Ct. at 2617. Absent an express congressional statement, state law [\*\*6] may be preempted in two situations: first, if the state law actually conflicts with federal law, see id.; Pacific Gas & Elec. Co v. Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983); or second, if federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it." Cippolone, 112 S. Ct. at 2617 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)).

## B. The Federal Communications Act

# 1. Broad Scope of the Act

In the instant case, AT&T asserts that the comprehensive regulatory scheme of the Communications Act is evidence of Congress' intent to preempt the entire field. The express purpose of the Communications Act is to "regulate interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient , , . communication service with adequate facilities [\*\*7] at reasonable charges." 47 U.S.C. § 151 (1988). To that end, the Act governs "all interstate . . . communication by wire or radio and . . . all persons engaged within the United States in such communication," id. § 152(a), and provides that an interstate telephone carrier's "charges, practices, classifications, and regulations for and in connection with its communications service, shall be just and reasonable," id. § 201(b).

AT&T, in asserting that the comprehensive nature of the Act demonstrates Congress' intent to occupy the entire field of long-distance telecommunications service, relies primarily on Ivy Broadcasting Co. v. American Telephone & Telegraph Co.. 391 F.2d 486 (2d Cir. 1968). In Ivy, the Second Circuit considered whether the district court had jurisdiction over a claim for negligence and breach of contract in connection with telephone services provided by a carrier regulated under the Communications Act. The plaintiff alleged grossly negligent and unreasonably delayed installation of telephone lines and grossly negligent operation of those lines, and claimed that federal jurisdiction lay [\*\*8] under the Communications Act. The district court dismissed the complaint for lack of subject matter jurisdiction, stating that the claims of negligence and breach of contract did not arise out of the Communications Act, but rather out of state tort and contract law. The Second Circuit reversed and remanded the case, holding that although the plaintiff's claims were not governed by the Act, such claims were governed by federal common law emanating from the Act. The court stated:

Questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and that the states are precluded from acting in this area.

Ivy, 391 F.2d at 491. Relying on this language, AT&T asserts that because the state law claims brought by CCI relate to communications services, those claims are preempted by the Communications Act.

# 2. Savings Clause of the Act

The court in Ivy did not address the "savings clause" of the Communications Act, set forth at section 414. The savings clause provides:

§ 414 Exclusiveness of Chapter

Nothing in this chapter [\*\*9] contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414. At issue, then, is whether the savings clause preserves CCI's state causes action against AT&T.

[\*1516] Courts in other jurisdictions have held that the savings clause preserves causes of action for breaches of duties distinguishable from those created under the Act. For example, in Kellerman v. MCI Telecommunications Corp., 112 III. 2d 428, 493 N.E.2d 1045, 98 III. Dec. 24 (III.), cert. denied, 479 U.S. 949, 93 L. Ed. 2d 384, 107 S. Ct. 434 (1986), the Illinois Supreme Court ruled that "state law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414." Id. at 1051. In Kellerman, the plaintiffs brought state law claims of fraud and deceptive advertising against the MCI, a provider [\*\*10] of long-distance telephone service. MCI argued that the claims were preempted by the Communications Act, relying, in part, on Ivy. The Kellerman court rejected that argument, and in reviewing the holding of Ivy, as well as the language of the savings clause, stated:

We believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the act." State-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Id. (quoting Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 694 (1st Cir. 1977)).

Similarly, in <u>Bruss Co. v. Allnet-Communication Services</u>, 606 **F.** SUDD. 401 (N.D. III. 19852 the court held that section 414 preserved the common law claims of the plaintiffs. The plaintiffs had sued Allnet, a provider of long-distance telephone services, alleging common law fraud and violations of Illinois' [\*\*11] deceptive trade and consumer fraud acts. The court found that the duties owed by the defendants under the common law causes of action were different from those duties created by the Communications Act. The court stated:

None of these causes of actions conflicts with provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress. The Court therefore concludes that § 414 applies to preserve these causes of action.

Id. at 411. See also Financial Planning Inst., Inc. v. American Tel & Tel. Co. 788 F. SUDD. 75 (D. Mass. 1992). The Financial Planning court clarified the intended function of the savings clause:

Not only did Congress not express an intent to provide for an exclusive federal